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No. 97 1783

In The

Supreme Court of The United States

October Term 1997

Supreme Court, U.S.
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CLERK

BARRY SCHIMMEL, et al.
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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29 U.S.C. § 501 . . . . . *passim*

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THE PARALLELS BETWEEN THE NINTH CIRCUIT'S DECISION IN PHILLIPS AND THIS CASE ARE STRONG AND THE CONFLICT IS CLEAR

The respondents-plaintiffs attempt to dismiss the conflict with the Ninth Circuit's decision in *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968), essentially by arguing that the facts in both cases are not 100% identical. But the point at issue *is* the same. And the factual parallels of the two cases are quite strong.

Consider those parallels. In both *Phillips* and this case (1) disaffected members decided to try to sway the loyalty of the employees from an incumbent union to a rival union; (2) those members were successful in forcing an election; (3) the employees voted to be represented by the rival and raiding union; (4) immediately thereafter the officers of the incumbent union took steps to safeguard the incumbent union's assets; (5) which caused disaffected former members of the incumbent to object and file suit; (6) the defendants in the suit were the officers of the incumbent, sued in their official capacity;[1] (7) the suit alleged a breach of fiduciary duty under § 501 of the LMRDA, 29 U.S.C. § 501; (8) the suit sought to seize the assets of the incumbent union; (9) in

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[1]The defendants here are being sued as individuals as well as in their official capacity.

order to distribute those assets to certain former members of the incumbent who continued to work in the unit formerly represented by the incumbent; and (10) the plaintiffs' litigation was financed by the rival and raiding union (which obviously stood to benefit from the demise of the incumbent).

In the face of this, plaintiffs are reduced to arguing that this Court should not grant *certiorari* because the facts of the two cases are not completely identical (indeed, the facts of the two cases are only substantially identical). It is true, as plaintiffs say, that in this case the employees voted to change from an independent union to an international union; while in *Phillips* the employees voted to abandon an affiliation with an international union in order to become part of a new (and therefore independent) union. But in making this seemingly irrelevant point plaintiffs ignore another obvious parallel: as far as can be gleaned from the Ninth Circuit's opinion in *Phillips*, the incumbent union there (Local 580 of the Pulp, Sulphite & Paper Mill Workers, AFL-CIO), *represented no other employees other than those in the unit which voted to change unions*.

Faced with these facts, the Ninth Circuit in *Phillips* looked to the legislative history of the LMRDA. It was struck by the parallel Congress had consciously drawn between a suit under § 501 and a shareholders'

derivative suit. The court noted that a shareholders' derivative suit *must* be brought for the benefit of the corporation itself and not for the benefit of the individual shareholders. Thus, the Ninth Circuit held that a § 501 suit must be brought for the benefit of the labor organization itself; and ruled that former members (who were, as the court noted, being financially supported by a rival and raiding union) could not bring suit to seize the assets of the local for the benefit of the individuals the local formerly represented.[2] In so ruling, the court cited to H. Rep. No. 741, 86 Cong., 1st Sess., 81 (1959). *This is the very same report to which the Eighth Circuit cited in its opinion in this case and upon which plaintiffs rely so heavily in their brief opposing certiorari.* (Pet. App at 15, Res. Br. at 9)

Obviously, then, this Court should grant *certiorari* to straighten this mess out. Rarely, if ever, are cases which give rise to conflicts among the circuits 100% factually identical. Indeed, we would respectfully suggest that rarely are the cases which give rise to the conflict more similar than those which are present here. The mere fact that this case has arisen and conflicts with

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[2]The district court below relied upon *Phillips*, *Pet. App.* 20, 27-29, 35-36; and it also drew the analogy to a shareholders' derivative suit. *Id.* at 35.

Phillips belies the argument that the issue is unimportant and will never occur again.

THE PETITION FOR A WRIT OF *CERTIORARI* PRESENTS IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT AND CONCERNING THE INTERPRETATION OF UNION CONSTITUTIONS

The respondents contend that this case is not appropriate for Supreme Court review because it involves a narrow set of facts. On the other hand, the respondents interpret the decision below to establish that the petitioners have violated their fiduciary duty by using dues money to organize other flight attendants.[3] The

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[3]In support of their conclusion that it was a breach of fiduciary duty for the IFFA officers to utilize union dues for organizing, the respondents rely on the testimony of Arthur Teolis, a former officer of IFFA who assisted the IAM in its raid. Res. Br. at 12, note 1. Although Teolis testified that IFFA had only engaged in one other organizing campaign, at Air Florida, the record also demonstrated that IFFA had sought to organize the TWA ticket agents and the employees of Trans World Express. Jt. App. at 241-43. The respondents' opposition to organizing activities also ignores the objective set forth in the IFFA constitution of uniting within IFFA all men

(continued...)

petitioners have failed, after extensive research, to find a single case which holds that it is a breach of fiduciary duty to spend union funds for organizing. Such a drastic redefinition of union officers' fiduciary duties would certainly affect the entire labor movement.

As we noted in the petition for *certiorari*, this Court has yet to address the proper application of § 501 of the LMRDA. However, those courts which have considered the statute have expressed reluctance to interfere with the business decisions made by unions' governing bodies. Pet. for *Cert.* at 19-24. A decision to spend union funds on such a basic union function as organizing would seem to come well within the discretion of union leaders. The eighth circuit's decision, which departs from the general principle accepted by courts which have considered § 501, and finds a purported limitation under the LMRDA on the ability of the IFFA officers to spend union funds for organizing, raises a significant issue for Supreme Court review.

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[3](...continued)
and women in the airline industry. Pet. App. at 48-49. In light of the evidence of IFFA's past and present involvement in organizing activities, the district court rejected the respondents attempts to interfere with IFFA's "using its assets for union business . . ." Pet. App. at 33.

Similarly, the opportunity for this Court to consider the principle according judicial deference to union interpretation of union constitutions is a compelling reason for granting *certiorari* here. The respondents contend that, because the IFFA Constitution did not have a specific provision for disposition of union assets following decertification, the eighth circuit was entitled to engraft its own principles of "equity" onto the IFFA Constitution. That position is contrary to IFFA's own constitutionally based interpretation of its ongoing purposes, and is thus contrary to the widely accepted principle of judicial deference to a union's construction of its constitution. See Pet. for *Cert.* at 24-28.

The members of IFFA had paid **membership** dues to IFFA. As elected officers of IFFA, the petitioners used those dues for the purposes of the organization the respondents had voluntarily joined.[4] The LMRDA was not intended to place substantive limits on union expenditures which do not violate the governing documents of the organization. *See e.g., McNamara v. Johnston*, 522 F.2d 1157 (7th Cir. 1975). Because this petition pro-

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[4]IFFA had in place procedures by which non-members could object to the use of agency fees for purposes not directly related to collective bargaining. Because the individual respondents purported to be members of IFFA, they would not have availed themselves of the objection procedures.

vides the Court with an opportunity to consider the important principle of judicial deference to a union's interpretation of its own constitution, a principle which the eighth circuit ignored, this case is appropriate for review upon a writ of *certiorari*.

THE RESPONDENTS' STATEMENT OF FACTS IGNORES THE FINDINGS MADE BY THE DISTRICT COURT AND THE DEFERENCE THAT MUST BE ACCORDED SUCH FINDINGS.

The respondents statement of the case is misleading because it does not reflect what the district court found. Their brief in opposition ignores the fact that the district court not only heard the evidence, but it also made credibility determinations.[5] The principle is well established that a reviewing court must give substantial deference to the findings made by the district court, especially with respect to findings based on the credibility of the witnesses. The reviewing court must accept the trial court's findings of fact unless they are clearly erroneous, *see Hosna v. Groose*, 80 F.3d 298, 303 (8th Cir. 1996), and must give the trial court substantial deference

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[5]The district court found that IFFA has acted to preserve IFFA assets, Pet. App. at 32, and that IFFA officers had not appropriated IFFA funds for their personal use. Pet. App. at 37.

with respect to its credibility determinations. *Black Hills Institute of Geological Research v. United States Department of Justice*, 978 F.2d 1043, 1044 (8th Cir. 1992); *also c.f. Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) (discussing the appropriate application of the clearly erroneous standard). The eighth circuit did not follow that principle in this case.

The respondents attempt to paint a sinister face on the IFFA officers' transfer of assets, but the district court credited the testimony that IFFA transferred the assets to protect them. Pet. App. at 32. In fact, those transfers occurred in the wake of extreme disloyalty by IFFA officers Sherry Cooper and Rocky Miller. The entire chain of events which led to this case arose because IFFA's former president, Sherry Cooper, had abused her office by providing the IAM with mailing lists and other assistance during its membership raid on IFFA. Pet. App. at 8-9.

After Cooper had resigned in an attempt to avoid her trial on internal union charges, Rocky Miller assumed the office. His first act as IFFA president was to issue a letter supporting the IAM's raid. Jt. App. at 283. The respondents charge that IFFA acted to prevent Miller from assuming a leadership role, when the record showed that he had failed to even set foot in IFFA offices for the last seven months in which IFFA served as the collective bargaining representative for the TWA

flight attendants. Jt. App. at 242. Miller failed even to appear to defend against the charges of dual unionism that had been levied against him.

The respondents also charge the IFFA officers with acting to change the purpose of the organization when it is clear that the resolution at issue drew its language and meaning from the objectives set forth in the IFFA constitution. The IFFA constitution provides as its first objective to "unite in this Union . . . all working men and working women employed in the airline industry . . . ." Pet. App. at 48-49. Therefore, one cannot reasonably argue that the petitioners changed the constitution when they set about organizing other flight attendants. The resolution also reiterated IFFA's goals to advance the interests of TWA flight attendants as well as those employed throughout the airline industry. Pet. App. at 40-43.

But in the end, it appears that the respondents' greatest objection to the continued functioning of IFFA is that IFFA's ongoing activities are contrary to the interests of the IAM. That factor is what makes the decision by the court of appeals so clearly in conflict with the *Phillips* decision. The plaintiffs in this case, just like the plaintiff in *Phillips*, are financed by and acting on behalf of a rival labor organization. The *Phillips* court recognized that § 501 of the LMRDA was not designed to provide adherents of a rival union with

a tool to disrupt the operation of their former union. 403 F.2d at 832. Because it is contrary to the IAM's interests for IFFA to continue to compete for the right to represent all flight attendants, the IAM has attempted to use § 501 to deprive IFFA of its assets. Whether or not the LMRDA can be used for such purposes is a question upon which the eighth and ninth circuits disagree and, accordingly, should be decided by the Supreme Court.

CONCLUSION

For each of the reasons stated above and in the Petition for *Certiorari*, the petitioners respectfully request that *Certiorari* be granted.

Respectfully Submitted,

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